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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 803

UNITED STATES GYPSUM COMPANY,
Petitioner and Appellant Below,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Appellee Below.

REPLY BRIEF.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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UNITED STATES GYPSUM COMPANY,
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UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Appellee Below.

REPLY BRIEF.

RESPONDENT'S "QUESTIONS PRESENTED".

Respondent's question 1 is based upon the erroneous assumption that Respondent remained exclusive collective bargaining representative of Petitioner's employees until it was decertified by the National Labor Relations Board.

Neither Respondent's question 1 nor Respondent's alternative questions encompass Petitioner's question 2 with reference to the arbitrability of the grievances *sub judice*. Its brief mentions this issue only with reference to the effect of Respondent's decertification on check-off.

RESPONDENT'S COUNTER-STATEMENT.

Respondent's counter-statement gives the obviously intended implication that no question of representation existed at the time Petitioner purchased the plant property. On the contrary, Respondent's certification as collective bargaining representative issued February 8, 1958, over 7 years prior to the purchase (R. 94).[1] Respondent had not contacted the seller after execution of its collective agreement in 1964 (R. 32) and Local Union No. 5674 had been acting for the employees and executed a written amendment to the collective agreement.[2] Respondent was not a party to this amendment (R. 28, 32). Respondent did not deliver to Petitioner any check-off authorizations (R. 30, 70) nor any evidence whatsoever of its representative status. Other information available to Petitioner indicated that Respondent did not represent a majority of the employees (R. 32-3). Although Petitioner's letter to Respondent of May 28, 1965 stated that Petitioner would negotiate with any union representing a majority of its employees and referred to a promised statement from Respondent of its representative position (R. 32-3, 38-9), Respondent filed its action in the District Court without submitting such a statement.

After Respondent's institution of the action, Petitioner filed its representation petition with the Board but at the hearing thereon Respondent opposed an election (R. 33, 97). Because of a change in the Board's rules with reference to an employer's representation petition, Petitioner filed a second representation petition and evidence of its

1. References to the printed record in the Court of Appeals are designated (R. ....).

2. The Local and International are separate and independent entities. *Quaker State Oil Refining Corp.* v. *NLRB*, 270 F. 2d 40 (CA 3, 1959); *Independent Stave Co., Inc.* v. *NLRB*, 352 F. 2d 553 (CA 8, 1965); *John L. Clemmey Company, Inc.*, 118 NLRB 599 (1957).

good faith doubt of Respondent's representation status (R. 91-92, 97-98). Respondent similarly opposed an election at the hearing on Petitioner's second petition (App. xxx).[3] The Board overruled Respondent's objections and ordered the election.[4] The election proved that Respondent did not represent a majority of Petitioner's employees (App. xxxiii). The delay in the election and decertification of Respondent was the result of Respondent's opposition thereto—not the fault of Petitioner.

Contrary to the last paragraph of Respondent's counterstatement (Br. 4, footnote 2), Petitioner's position below was that *Wiley*[5] was not applicable to the case *sub. judice*, not that the decision in *Wiley* was wrong. Contrary to the statement in this paragraph (Br. 4), that the petition is limited to issues stemming from the decertification, the grievances are unarbitrable for all of the reasons stated in the petition (pp. 14-17).

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3. References to the Appendices to the Petition are designated (App. ....).

4. Footnote 3 to the Board's decision, however, implied that Respondent might avoid an election by a refusal to bargain charge (App. xxx). Respondent filed such a charge but withdrew the same and filed no objections to the election.

5. *Wiley* v. *Livingston*, 376 U. S. 543 (1964).

ARGUMENT.

Respondent's argument assumes that Respondent had the status of a certified bargaining representative until its decertification and this assumption conflicts in principle with the decisions of the Board and Courts of Appeal for the Second, Sixth and other Circuits and prior decisions of the Court below with reference to a union's rights after it has ceased to be the representative of a majority of the employees.

In the first place Respondent's argument that Petitioner seeks the benefits of its own wrongdoing has no basis in the record. Petitioner's refusal to recognize Respondent or its contract was not unlawful. In *Celanese Corp. of America,* 95 NLRB 664, 671-2 (1951), the Board established the rule that if the employer has fair doubts about the union's continuing majority, he may refuse to bargain further with it.[6] Referring to this rule, this Court stated in *Brooks* v. *Labor Board,* 348 U. S. 96, 104, "This, too, is a matter appropriately determined by the Board's administrative authority." It has been followed by the Courts of Appeal for the Second Circuit (*NLRB* v. *Superior Fireproof Door & Sash Co., Inc.,* 289 F. 2d 713, 719 (1961)) and Sixth Circuit (*NLRB* v. *Electric Furnace Co.,* 327 F. 2d 373, 376 (1964)) and in decisions prior to this case by the court below (*NLRB* v. *Dan River Mills, Incorporated,* 274 F. 2d 381, 389 (CA 5, 1960); *NLRB* v. *Minute Maid Corporation,* 283 F. 2d 705, 710 (CA 5, 1960); *NLRB* v. *Florida*

6. This rule has been consistently followed by the Board. *Stoner Rubber Company, Inc.,* 123 NLRB 1440, 1444-5 (1959); *Mitchell Standard Corporation,* 140 NLRB 496, 499 (1963); *National Carbon Division,* 105 NLRB 441, 444 (1953); *American Laundry Machinery Company,* 107 NLRB 1574, 1583 (1954).

Citrus Canners Cooperative, 288 F. 2d 630, 639 (CA 5, 1961)).

Petitioner's refusal to assume Respondent's contract with the seller was not unlawful. This court, although urged to do so, did not go so far in *Wiley* as to hold that the merged corporation's entire collective agreement was binding on the resulting corporation. The Court below did not hold that the seller's entire agreement with Respondent was binding on Petitioner. The Board has consistently held that the collective agreement with a seller of a business enterprise, unless expressly assumed by the purchaser, does not bar a representation proceeding filed by a bona fide purchaser of the enterprise. *General Extrusion Co.,* 121 NLRB 1165, 1168 (1958); *Stubnitz Green Spring Corp.,* 113 NLRB 226, 228 (1958); *Jolly Giant Lumber Co.,* 114 NLRB 413, 414 (1955); *Rohlik, Inc.,* 145 NLRB 1236, 1242 fn. 15 (1964). This application of the Board's contract bar rule is likewise within the Board's discretion. *Local 1545, United Bro. of Carpenters etc.* v. *Vincent,* 286 F. 2d 127, 130-131 (CA 2, 1960); *NLRB* v. *Grace Co.,* 184 F. 2d 126, 129 (CA 8, 1950); *Kearney & Trecker Corp.* v. *NLRB,* 210 F. 2d 852, 857, cert. den. 1954, 348 U. S. 824. Respondent's assertion (Br. 7) that in the instant case the Board departed from its own decisions is without merit.

Respondent's argument also conflicts in principle with the rule that after the Board has issued a notice of hearing on a representation petition the employer is justified in refusing to bargain while the proceeding is pending. *Henry Heide, Inc.,* 107 NLRB 1160, 1163 (1954). Issuance of the notice of hearing indicates that the Board is of the opinion that a question of representation exists. *Brooks* v. *NLRB,* 348 U. S. 96, 103; *NLRB* v. *Electric Furnace Co.,* 327 F. 2d 373, 377 (1964). Furthermore, in the circumstances here present Petitioner would have violated the Act if it had

recognized or arbitrated[7] with Respondent while the representation petition was pending. *International Ladies Garment Workers Union* v. *NLRB*, 366 U. S. 731, 732-740 (1961); *NLRB* v. *Electric Furnace Co.*, 327 F. 2d 373, 377 (CA 6, 1964). While the election is not conclusive evidence that Respondent did not represent the majority of the employees at the time of the purchase, it is evidence of that fact.

There is no evidence in the record of any unfair labor practice by Petitioner. Petitioner did all in its power to settle the issue. It invited Respondent to furnish evidence of its status. Receiving none, Petitioner filed the representation petitions placing the matter under the jurisdiction of the Board, with the resulting decertification. If Respondent had evidence that the result of the election was due to any unfair labor practice of Petitioner, it should have filed objections to the election with the Board. *Irving Air Chute Co., Inc.*, 149 NLRB 627, 629 (1964); *Kaplin Bros. Co., Inc.*, 149 NLRB 1378, 1380 (1964). The Board is not a party to these proceedings and the validity of its action cannot be attacked here.

The Court below found that the record contained nothing to give it a "sure basis" to uphold Respondent's attack on the validity of the Board decertification. It nevertheless asserted (App. xxii), "these factors go a long way toward supporting our basic decision," *i.e.*, the need for a champion of possible rights of employees,[8] and qualified the statutory right of employees to be represented by a bargaining agent of their own choosing by affirming the order

7. The arbitration of grievances is a part and parcel of the collective bargaining process as defined in Section 8(d) of the Act (29 U. S. C. § 158(d)), *United Steelworkers of America* v. *Warrior & Gulf*, 363 U. S. 574, 578 (1960); *Timken Roller Bearing Co.* v. *NLRB*, 161 F. 2d 949, 954 (CA 6, 1947).

8. The Court below stated rights of employees which were nonexistent in this case (see Petition, p. 13).

that Respondent must be that champion regardless of the fact that it did not represent the employees and had been rejected by them in the Board conducted election. Also by compelling arbitration of the recognition of Respondent's collective agreement the Court below established a procedure by which terms and conditions of employment might be frozen for two years contrary to the federal policy of voluntary consummation of collective agreements through collective bargaining with representatives of the employees' own choosing.

CONCLUSION.

Respondent's arguments raise a substantial question as to an employer's obligation to bargain during the pendency before the Board of a representation proceeding as well as the questions pertaining to the recognition to be accorded a certification of the National Labor Relations Board and the issues which a successor-employer must arbitrate under a collective agreement of his predecessor referred to in the petition *sub judice*. It is respectfully submitted that a final determination of these questions is of great importance in the administration of the Act and to the collective bargaining relationship throughout the nation.

Respectfully submitted,

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December 18, 1967.